

**WORKMAN | NYDEGGER** A PROFESSIONAL CORPORATION

Sterling A. Brennan (Utah State Bar No. 10060; E-mail: sbrennan@wnlaw.com)

David R. Wright (Utah State Bar No. 5164; E-mail: dwright@wnlaw.com)

Kirk R. Harris (Utah State Bar No. 10221; E-mail: kharris@wnlaw.com)

Cara J. Baldwin (Utah State Bar No. 11863; E-mail: cbaldwin@wnlaw.com)

1000 Eagle Gate Tower

60 E. South Temple

Salt Lake City, Utah 84111

Telephone: (801) 533-9800

Facsimile: (801) 328-1707

**MORRISON & FOERSTER LLP**Michael A. Jacobs (Admitted *Pro Hac Vice*; E-mail: mjacobs@mofo.com)Eric M. Acker (Admitted *Pro Hac Vice*; E-mail: eacker@mofo.com)Grant L. Kim (Admitted *Pro Hac Vice*; E-Mail: gkim@mofo.com)

425 Market Street

San Francisco, California 94105-2482

Telephone: (415) 268-7000

Facsimile: (415) 268-7522

Attorneys for Defendant and Counterclaim-Plaintiff Novell, Inc.

**IN THE UNITED STATES DISTRICT COURT****DISTRICT OF UTAH, CENTRAL DIVISION**THE SCO GROUP, INC., a Delaware  
corporation,

Plaintiff,

vs.

NOVELL, INC., a Delaware corporation,

Defendant.

AND RELATED COUNTERCLAIMS.

Case No. 2:04CV00139

**NOVELL'S MOTION IN LIMINE  
NO. 2 TO DETERMINE THAT FIRST  
AMENDMENT DEFENSES APPLY  
TO SLANDER OF TITLE**

Judge Ted Stewart

SCO claims that Novell slandered SCO's alleged title to the UNIX copyrights by falsely stating that SCO did not own the UNIX copyrights. (Second Am. Compl. ¶¶ 9-10, 91-92, Dkt. No. 96.) Novell has asserted the First Amendment as a defense. (Novell's Answer ¶ 136, Dkt. No. 115.) The First Amendment protects corporations, as the Supreme Court recently confirmed. *Citizens United v. FEC*, 2010 U.S. LEXIS 766 (U.S. Jan. 21, 2010) (Ex. 2A). Novell moves for a ruling that First Amendment defenses apply to SCO's slander of title claim, because the First Amendment applies to any claim based on an alleged "injurious falsehood."

#### **I. FIRST AMENDMENT DEFENSES APPLY TO SLANDER OF TITLE**

The Supreme Court held in *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964), that the First Amendment requires a public official to prove that a defamatory falsehood about his official conduct was made with "actual malice," meaning "knowledge that it was false or with reckless disregard of whether it was false or not." The Supreme Court later extended this defense to claims by private individuals who are "limited public figures."<sup>1</sup> The Supreme Court also extended this defense to claims for invasion of privacy and intentional infliction of emotional distress that are based on allegedly false or offensive speech. See *Time, Inc. v. Hill*, 385 U.S. 374, 390-91 (1967) (private individuals must prove "actual malice" on invasion of privacy claim based on allegedly false report on newsworthy matter); *Hustler Magazine v. Falwell*, 485 U.S. 46, 51-53 (1988) (First Amendment applies to intentional infliction of emotional distress claim based on "outrageous" caricature of Jerry Falwell, a public figure).

The Supreme Court relied on the same principle in all of these cases: First Amendment defenses to tort claims based on allegedly false speech are essential to ensure adequate

---

<sup>1</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351-52 (1974) ("actual malice" must be shown by individual who became public figure by "voluntarily inject[ing] himself or [being] drawn into a particular public controversy," and First Amendment requires proof of fault even by a purely private individual).

“breathing space” for “uninhibited, robust, and wide-open debate” on matters of public concern. *See, e.g., New York Times*, 376 U.S. at 269-72; *Time*, 385 U.S. at 388; *Hustler*, 485 U.S. at 52.

Federal courts have relied on this principle in extending the First Amendment to other claims directed against an allegedly wrongful statement. The Tenth Circuit affirmed dismissal of an injurious falsehood claim based on a “negative outlook” bond rating, finding that this was a constitutionally protected opinion, and plaintiff had failed to identify any false statement of fact. *Jefferson County Sch. Dist. No. K-1 v. Moody’s Investor’s Services, Inc.*, 175 F.3d 848, 856 (10th Cir. 1999). The Tenth Circuit held that the First Amendment also barred antitrust and tortious interference claims, rejecting the argument that those claims involved conduct rather than speech. *Id.* at 856-60. The Tenth Circuit cited the Supreme Court’s concern about “the chilling effect on protected speech that might ensue if damages could be recovered on emotional distress claims for publications that were not provably false.” *Id.* at 857, *citing Hustler*, 485 U.S. at 53-55. It also noted that the Ninth Circuit and other courts had “reject[ed] a variety of tort claims based on speech protected by the First Amendment,” including trade libel, tortious interference, and disparagement.<sup>2</sup> *Id.*; *see Bose Corp. v. Consumers Union*, 508 F. Supp. 1249, 1270-71 (D. Mass. 1981) (First Amendment applies to product disparagement claim), *rev’d on other grounds*, 692 F.2d 189 (1st Cir. 1982), *aff’d in relevant part*, 466 U.S. 485 (1984).

Similarly, the California Supreme Court held that First Amendment protections “apply to all claims whose gravamen is the alleged injurious falsehood of a statement” as “constitutional protection does not depend on the label given the stated cause of action.” *Blatty v. New York*

---

<sup>2</sup> The Tenth Circuit cited *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057-58 (9th Cir. 1990) (First Amendment applies to product disparagement, trade libel, and tortious interference); *Henderson v. Times Mirror Co.*, 669 F. Supp. 356, 362 (D. Colo. 1987) (disparagement and intentional interference claims), *aff’d*, 876 F.2d 108 (10th Cir. 1989); *So. Dakota v. Kansas City So. Indus.*, 880 F.2d 40, 50-54 (8th Cir. 1989) (tortious interference), *overruled on other grounds*, *Warfield v. KR Entm’t, Inc. (In re Federal Fountain, Inc.)*, 165 F.3d 600, 601 (8th Cir. 1999); and *Eddy’s Toyota of Wichita, Inc. v. Kmart Corp.*, 945 F. Supp. 220, 224 (D. Kan. 1996) (tortious interference).

*Times, Co.*, 42 Cal. 3d 1033, 1042-1043 (1987).<sup>3</sup> Thus, the First Amendment applies to claims for trade libel, negligence, and intentional and negligent interference with economic advantage that “have as their gravamen the alleged injurious falsehood of a statement...” *Id.* at 1037.

SCO’s slander of title claim is explicitly based on Novell’s allegedly false statement that SCO does not own the UNIX copyrights. While no court appears to have addressed whether slander of title is subject to the First Amendment, the above cases compel the conclusion that it is subject to the same First Amendment defenses that apply to any claim based on “injurious falsehood.” Slander of title is closely related to injurious falsehood, trade libel, and other torts to which the First Amendment has expressly been held to apply. As Dean Prosser noted:

There is a tort which passes by many names. Sometimes it is called slander of title, sometimes slander of goods, or disparagement of goods, or trade libel, or unfair competition, or interference with prospective advantage....Under whatever name, the essentials of the tort appear to be the same. It consists of the publication...of false statements concerning the plaintiff, his property, or his business.

Dean William L. Prosser, *Injurious Falsehood: The Basis of Liability*, 59 Colum. L. Rev. 425, 425 (1959) (Ex. 2B); *see also Direct Import Buyers Ass’n v. KSL, Inc.*, 538 P.2d 1040, 1042 (Utah 1975) (slander of title and injurious falsehood are similar); *Art Metal-U.S.A., Inc. v. United States*, 753 F.2d 1151, 1155 (D.C. Cir. 1985) (injurious falsehood and defamation have “always been very closely related,” citing Restatement (Second) of Torts § 623A comment g (1977) (Ex. 2C)).

---

<sup>3</sup> Utah courts give substantial weight to California precedents concerning First Amendment rights, especially when interpreting the corresponding right under the Utah Constitution. *See West v. Thomson Newspapers*, 872 P.2d 999, 1016-17 (Utah 1994) (relying on California Supreme Court precedent in concluding that “the Utah Constitution protects expressions of opinion”).

DATED: February 8, 2010

Respectfully submitted,

By:     /s/ Sterling A. Brennan      
WORKMAN NYDEGGER

MORRISON & FOERSTER LLP

Attorneys for Defendant and  
Counterclaim-Plaintiff Novell, Inc.